

(26,622)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 536.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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I. Petition.

Filed December 19, 1912.

In the Court of Claims of the United States.

No. 31973.

KANSAS CITY SOUTHERN RAILWAY COMPANY

VS.

UNITED STATES.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Kansas City Southern Railway Company, respectfully represents:

I.

That petitioner is a corporation duly organized and existing under the laws of the State of Missouri, and owns and operates, and at the times hereinafter stated did own and operate, a line of railway extending from Kansas City, Missouri, to Port Arthur, Texas, over which said line petitioner is now, and at the times hereinafter stated was, transporting the United States mails.

II.

That for many years petitioner has transported the mails over its road between De Quincy and Lake Charles, Louisiana; Siloam Springs and Texarkana, Arkansas, and Kansas City, Missouri, and Siloam Springs, Arkansas, which said portions of its road have been and still are designated by the Post-Office Department as mail routes numbers 149,027, 153,011, and 155,054, respectively.

That in or about the month of June, 1906, petitioner entered into contracts with said Department, agreeing to transport the mails over said routes "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

That said agreements contained no reference whatsoever to the time schedule according to which petitioner's trains were operated nor any undertaking, express or implied, that petitioner would transport the mails, according to the time of arrival and departure of petitioner's trains as set forth in said schedule.

That furthermore there was no provision of said contracts whereby the Post-Office Department was authorized to deduct from the compensation thereby agreed to be paid to petitioner any sum or sums for failure to perform service, owing to a lack of mails to be transported.

III.

That the act of Congress of June 26, 1906 (34 Stat. L., 467), providing for the expense of the postal service for the fiscal year ending June 30, 1907, provided (pp. 472-473):

"That the Postmaster-General shall require all railroads carrying the mails under contract to comply with the terms of said contract, as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions."

That the above provision of said act by express terms applied only to contracts for transportation of the mails wherein the time of arrival and departure of the mails was stipulated; that in point of fact such contracts do not now and never have contained such a stipulation, nor was there any such stipulation embodied in the contracts aforesaid, entered into by petitioner, for carrying the mails over routes numbers 149,027, 153,011, and 155,054.

IV.

That in view of this condition of affairs, the aforesaid provision of the act of June 26, 1906, was sought to be remedied by the following provision of the act of March 2, 1907 (34 Stat. L., 1205, 1212), providing for the expenses of the Post-Office Department for the fiscal year ending June 30, 1908:

"That the Postmaster-General shall require all railroads carrying the mails to maintain their regular train schedules as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions."

That while the above-mentioned act of March 2, 1907, was before Congress in the form of a bill that body was informed that the above-quoted provision of the act of June 26, 1906, was inoperative and void, because the contracts with railroad companies for transporting the mails contained no provision fixing the exact time of arrival and departure of their mail trains, and it was in the light of this information that the aforesaid change was incorporated in the act of March 2, 1907.

V.

That notwithstanding the premises aforementioned the Post-Office Department unlawfully withheld from your petitioner, during the fiscal year ending June 30, 1907, the sum of three thousand

5 three hundred and fifty-five dollars and forty-eight cents, as a penalty imposed on account of late arrivals of petitioner's trains and failure to perform service on the above-mentioned mail routes, distributed as follows:

Route No.	Amount of fine.
149,027	\$16.94
153,011	2,547.32
155,054	791.22
Total	<u>\$3,355.48</u>

That the said sum of money shown to be due your petitioner is justly due and owing to it by the United States, the same having been and still being unlawfully withheld from your petitioner by the United States and its postal authorities in the manner and for the reasons herein previously set forth, and that there exists in favor of the United States and against your petitioner no debt, claim, or set-off by which the said amount herein prayed for may be or should be reduced or retained.

Your petitioner prays, therefore, that this honorable court will render a judgment in its favor against the United States in the full sum of three thousand three hundred and fifty-five dollars and forty-eight cents (\$3,355.48), the same being due and wholly unpaid.

KANSAS CITY SOUTHERN RAIL-
WAY COMPANY,

By J. F. HOLDEN, *Vice-President.*

6 STATE OF MISSOURI,
County of Jackson, ss:

Before me, Clarence R. Hall, a notary public in and for the State and county aforesaid, appeared J. F. Holden, known to me to be the vice-president of the Kansas City Southern Railway Company, and made oath before me that the allegations of said petition are true to the best of his knowledge, information and belief.

J. F. HOLDEN.

Subscribed and sworn to before me this 9th day of December, A. D. 1912.

[NOTARIAL SEAL.]

CLARENCE R. HALL,
Notary Public, Jackson County, Missouri.

My commission expires October 14, 1916.

BRITTON & GRAY,
Attorneys for Claimant.

S. W. MOORE,
General Solicitor.

II. General Traverse.

Court of Claims.

No. 31973.

KANSAS CITY SOUTHERN RAILWAY COMPANY

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. Argument and Submission of Case.

On January 28, 1918, the case was argued and submitted on merits by Mr. Alexander Britton, for the claimant, and Messrs. Charles H. Bradley, Joseph Stewart and J. R. Anderson, for the defendants.

IV. Findings of Fact and Conclusion of Law.

Filed March 4, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

Claimant is a corporation organized under the laws of the State of Missouri. During the times hereinafter stated it operated trains and transported the mails over and upon the several railroad mail routes hereinafter mentioned.

II.

As the quadrennial term for which readjustment had been made on routes Nos. 149027, DeQuincy to Lake Charles, Louisiana; 153011, Siloam Springs, Arkansas, to Port Arthur, Texas; and 155054, Kansas City, Missouri, to Siloam Springs, Arkansas, would expire by limitation June 30, 1906, the Postmaster General, on February 13, 1906, in accordance with established practice, sent to the claimant distance circulars for the three named routes, which claimant was requested to fill out with certain specific information called

for thereon and to return the completed circulars to the department. As transmitted to the claimant the forms contained an agreement clause to be executed by a principal officer of the company as follows:

9 The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service.

These circulars, properly filled and signed as to the agreement clause, were returned by the claimant to the department.

The Postmaster General caused the mails to be weighed on said railroad mail routes as provided by law, and thereafter issued orders, dated September 25, 1906, on route 149027, September 26, 1906, on route 153011, and September 10, 1906, on route 155054, stating the amounts and rates of compensation for the service as provided for by law for the new term from July 1, 1906, to June 30, 1910, and gave the claimant notice thereof on the same dates respectively. Each contained the following:

This adjustment is subject to future orders, and to fines and deductions, and is based on service of not less than six round trips per week.

Said notices to the claimant company contained the following:

This adjustment is subject to future orders, and to fines and deductions, and is based on service of not less than six round trips per week.

III.

At the time the agreements hereinbefore mentioned were made the following laws and regulations were in effect:

The Postmaster General is authorized and directed to readjust the compensation * * * to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for * * * (railway postal clerks) to accompany and distribute the mails.

10 The Postmaster General may make deductions from the pay of contractors for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

Railroad companies must furnish quarterly, to the division superintendent of Railway Mail Service, statements on the form prescribed by the Post Office Department, and affirmed under oath of their respective principal transportation officers, showing by routes all failures of trains carrying the mail; also, when called upon to do so, railroad companies will be required to furnish monthly statements, certified as above, of all delays, and their causes, to trains which the department regards as being of special importance as mail trains.

Deductions will be made within the limit fixed by law (sec. 1332), the amount thereof to depend upon the nature or frequency of the failure and the importance of the mail.

Railroad Service.

2. The compensation for service on each route shall be apportioned, as nearly as practicable, among the several trains carrying mail, according to the average weight of mail carried by each train.

3. Deductions will be made for failure to perform any trip, or a part thereof, on the basis of the mileage and the average weight of the mail carried by the train.

* * * * *

12. Trains which the department regards as being of special importance as mail trains will be subject to deductions for failure to arrive at junction and terminal points at the time fixed by schedule unless held for mail connections, or unless satisfactory explanation be given in due time.

11 13. Applications from railroad companies for remission of deductions made from their compensation for carrying mail will not be considered unless filed in the office of the Second Assistant Postmaster General within six months from the date of notice by the Post Office Department to the railroad company that such deduction has been ordered.

* * * * *

The specific requirements of the service as to due frequency and speed, space required on trains or at stations, fixtures, furniture, etc., will at all times be determined by the Post Office Department and made known through the General Superintendent of Railway Mail Service.

Thereafter the Second Assistant Postmaster General, under date of October 2, 1905, issued the following order:

On account of the inferior service resulting from failures to observe the schedule on routes, or parts of routes, on which railroad mail service is not more frequent than seven times a week each way, it is ordered that in certifying to the performance of the service on such routes for, and subsequent to, the quarter ended December 31, 1905, deductions be made at the rate of twenty (20) per cent of the value of each train that arrives at the termini or junction points fifteen (15), or more minutes late and the aggregate number of late arrivals if ten (10) or more, without satisfactory excuse, in any one quarter, except that no deduction of less than one dollar (\$1) will be made.

Thereafter Congress, by act of June 26, 1906 (34 Stat. L., ch. 3546, pp. 467, 472, 473), provided as follows:

That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as

to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions.

12 Thereafter the Postmaster General on August 3, 1906, issued order No. 1131, as follows:

The act making appropriations for the Postal Service for the fiscal year ending June 30, 1907, provides:

"That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay when such delay is not caused by unavoidable accidents or conditions."

It is therefore ordered, That every railroad company operating a route over which mails are carried shall, on the regular affidavit covering failures of mail-train service which it is required to submit promptly at the end of each quarter to the respective division superintendents, Railway Mail Service, show, in addition to and separate from such mail-train failures, the number of minutes late of each arrival (not time of arrival) of every train carrying mail which has reached the terminus of said route, the terminus of such train's run, or any intermediate point designated by the Postmaster General and of which the company shall have notice, 30 or more minutes late as many as ten times during the quarter, the extent, cause in detail, and place of each delay being given.

This order supersedes that of October 2, 1905.

IV.

On August 6, 1906, the Second Assistant Postmaster General sent to the General Superintendent of Railway Mail Service the following instructions:

In the matter of requiring railroad companies to observe their schedule as contemplated by the act making appropriations for the Postal Service for the fiscal year ending June 30, 1907 (see Postmaster General's Order 1131 of Aug. 3, 1906), you will please

13 have each company properly instructed by the division superintendents, Railway Mail Service, who need not for the present verify such portion of the regular affidavit as relates solely to the failures to observe schedule of arrival and departure.

The reports required by Postmaster General's Order 1131 supersede the detention statements forwarded under the order of October 2, 1905, providing for deductions on account of late arrivals on routes or parts of routes where the railroad-mail service was not more frequent than seven times a week each way.

As under the order of October 2, 1905, when a train is held for connections, it should be stated whether such connection is a mail train from which mails are received, what company operates it, and its number.

Detentions to freight trains carrying the mail need not be reported at present over such portions of a route as have in operation mail

service by passenger or mixed trains with a frequency of at least once a day each way.

The act referred to is effective July 1, 1906, and it is desired that, as far as practicable, the reports show detentions from that date.

On August 7, 1906, the General Superintendent of Railway Mail Service sent to the division superintendents of said service a copy of the above letter dated August 6, 1906, and directed such superintendents to instruct the various railroad companies in their divisions as directed by the Second Assistant Postmaster General.

On August 13, 1906, the division superintendent, seventh division, Railway Mail Service, sent to the general manager of the claimant a letter informing him that the Postmaster General had promulgated order 1131 and transmitted a copy of said order. After setting forth the order of the Postmaster General said letter proceeded as follows:

14 The reports required by the Postmaster General's order 1131 will supersede the detention statements forwarded under the order of October 2nd, 1905, providing for deductions on account of late arrivals on routes or parts of routes where the railroad mail service is not more frequent than seven times a week each way.

As under the order of October 2, 1905, when a train is held for connections it should be stated whether such connection is a mail train from which mails are received, what company operates it, and its number.

Detentions to freight trains carrying the mails need not be reported at present over such portions of a route as have in operation mail service by messenger or mixed trains with frequency of at least once a day each way.

The act referred to is effective July 1, 1906, and it is desired that, as far as practicable, the reports show detentions from that date.

On December 29, 1906, the division superintendent, Eleventh Division, Railway Mail Service, wrote claimant company with reference to order 1131, after quoting which he instructed the claimant as follows:

In making reports of delays to trains, as called for in the above order, please conform to the following requirements:

"1. The extent (not the time of arrival) of each late arrival at the terminus of the route, any intermediate point designated by the Postmaster General, or (in the event the terminus of the route and that of the train's run are not identical), at the terminus of the train's run, should be shown.

"2. Where delays are due to wrecks, derailments, breakage of machinery, and other causes of like nature, full explanation should be given of the causes of the same, as shown on the company's records.

"3. Where delays are due to waiting for 'connections,' it should be stated whether or not such connection is a mail train from which mails are received, what company operates such train, its number, etc.

15 "4. Where delays are due to slow track, soft track, or slippery rails, the cause should be given in detail.

"5. Where heavy wind is given as the cause of delay, the velocity of the wind should be shown.

"6. The extent of the delay due to each cause should be shown separately.

"The explanation that delays are due to switching or handling freight is not considered satisfactory.

"The following excuses for late arrivals will be regarded as satisfactory:

"Waiting for mail connection, when shown as indicated in paragraph 3 hereof.

"Breakage of machinery, hot boxes, and trains breaking in two, after proper inspection; but the result of the inspection should be shown.

"Repairs or damage to bridges.

"Wrecks, slow track, soft track, and slippery rails, when satisfactorily explained.

"Providential causes, such as washouts, snow blockades, and landslides, and

"Certain other delays which are not due to, in the opinion of the department, carelessness, negligence, or lack of proper skill on the part of railroad employees.

"Payments to railroad companies for services performed are apt to be delayed unless these affidavits, in proper form, are forwarded to the department promptly."

Detentions to freight trains carrying mails need not be reported for the present, over any route or part of same, where there is also mail service by passenger or mixed train with a frequency of at least once a day.

No report of late arrivals need be made for any train, where such train does not arrive at terminal of route, or of train, or some intermediate point or points designated by the department, thirty minutes or more late, for as many as ten times during the quarter. Where none of the trains on any route arrive thirty or more minutes late as many as ten times during the quarter the statement, "No late arrivals to report" will be satisfactory.

16 Each affidavit, however, should first show the failures of train service, if any, and if not, "No failures." It should then either show the late arrivals, or if there are none to report, be indorsed, "No late arrivals to report."

Said letters were received by claimant's general manager in due course of mails.

On December 23, 1906, the Chief of the Division of Inspection, Post Office Department, submitted to the Second Assistant Postmaster General the following memorandum, which was approved by him and the deductions recommended were authorized by the Postmaster General December 28, 1906:

In compliance with your instructions, and in order that intelligent consideration may be given to the question of the rate at which deductions shall be made from the pay of railroad companies under Postmaster General's order No. 1131, of August 3, 1906, because of

delays to mail trains, I have the honor to submit herewith a statement showing, as far as practicable at this time, the effect, so far as amounts are concerned, of deductions at the rate of 20 per cent and 10 per cent of the compensation of all mail trains which have failed to reach the termini of their routes, or runs if less than a route, within 30 minutes of the schedule as many as 10 times without satisfactory excuse in the quarter ended September 30, 1906, and which will be dealt with in making our settlement for the December quarter, which is about to take place.

There are at present 3,146 railroad routes in operation—consequently that many detention affidavits due. We have received and examined 2,256, of which 1,716 will be filed without further action and 540 cases made on the remainder. Of the 890 affidavits still to be received and examined, it is assumed that the percentage of cases made will be very much larger than that made on the affidavits already in and examined. This opinion is based upon the fact that the delay in sending them to the department is due in part
17 to the large number of failures to maintain schedule which have taken place on the routes in question and upon the further fact that the affidavits on a good many of the largest routes are yet due.

The accompanying lists (one from each of our railroad desks) show in detail the number of routes in each State, detention affidavits received, those filed "clear," the number of cases made, the total quarterly pay of the routes on which the affidavits received indicate that deductions will be necessary on account of failures to maintain schedule, the total deduction at 20 per cent, at 10 per cent, and the per cent those amounts are of the quarterly compensation earned by the routes involved.

From these tables it appears that if a deduction of 20 per cent of the value of the trains that have failed to comply with the schedule is made, it would amount to 2.43 per cent of the companies' entire compensation for the quarter. By entire compensation we mean the payment for the trains which were on time or late from a satisfactory excuse, as well as for those that were late from a bad excuse; deductions at 10 per cent would amount to 1.22 per cent of the entire compensation.

In considering this question, it should be borne in mind that owing to the late date, August 3, on which the order covering the call for the information desired in detention statements was issued, many of them are necessarily incomplete, and in some cases, notably that of Long Island Railroad Company, comprising 13 routes, it has not been possible to secure anything in the way of a statement of detentions. In each case of this character, a nominal fine of \$10 will be imposed upon the route with the understanding that the company will furnish all necessary information for each quarter subsequent to that ending September 30, 1906.

The total quarterly compensation on routes on which the affidavits received indicate that deductions will be necessary in the

18 December quarter settlement is \$4,038,772.45, and the deduction at 20 per cent amounts to \$98,509.77; at 10 per cent, \$49,254.88.

During the September quarter railroad service should be better throughout the country than at any other time in the year on account of favorable weather conditions and that, in addition to the fact that the deductions to be made on routes for which the detention affidavits have not yet been received and examined will undoubtedly be larger than those that have already been passed upon, should have due consideration at this time. It is probable that we will be able to give practically full returns, except that, as heretofore mentioned, a number of the affidavits may be incomplete by February 1, 1906.

Under the order of October 2, 1905, providing for deductions on routes on which the service was not more frequent than once a day each way for failures to observe schedules, the rate of deduction was fixed at 20 per cent of the compensation of the delayed trains, the margin being 15 minutes instead of 30 as under the present rule.

A large number of our cases for the December quarter are now ready to close, but will necessarily be held awaiting your decision as to the rate or percentage at which the deductions shall be made. Deductions at the rate of 20 per cent would not seem to be unreasonable.

V.

For the quarter ended September 30, 1906, the claimant company rendered its statement of failures on mail route 153011 as follows:

The Kansas City Southern Railway Company.

Statement of Failures on Route No. 153,011, Between Siloam Springs, Arkansas, and Port Arthur, Texas, for the Quarter Ending September 30, 1906.

Date of failure.	Train No.	Points between which failure occurred.	Cause of failure. (Describe the failure and state disposition made of mail.)
.....	(No failures)

19 *Mail Trains Arriving at End of Route 30 Minutes or More Late.*

Date.	Delays.		Cause of delay.
	Hrs.	Min.	
Arriving at Port Arthur			
Train #1.			
July	4.	3 55	Derailement of engine 375 at Horatio; broken axle on engine 335, mile 701.
	5.	4 10	Derailement of train extra, engine 375, at Horatio; derailement of train No. 52, mile 561.
	14.	1 15	Blocked by switch engine at Shreveport; soft track between Shreveport and Forbing; engine died at De Quincy, a/c water in fuel oil.
	19.	3 35	Derailement of train No. 37, mile 570.
	22.	.. 40	Meeting delayed freight train; soft track between De Quincy and Beaumont.
	24.	.. 55	Changing engines at Kansas City; hot driving box at Lanagan, Mo.; losing key out of driving box, Gentry, Ark.
Aug.	4.	3 35	Engine 102 broke down at Frierson; engine 337 running hot between Frierson and Zwolle; engine 251 running hot between De Quincy and Beaumont.
	5.	.. 50	Heavy transfer to Lake Charles branch at De Quincy; heavy express and baggage at Beaumont.
	9.	4 30	Derailement on mile 359.
	10.	1 55	Soft track between Asbury and Neosho; set out extra car at Joplin; hot box on engine 502 at Sulphur Springs; hot box on express car at Stillwell.
	16.	1 10	Repairing drawbar on combination car at Ruliff; trouble with drawbar between Beaumont and Port Arthur.
	18.	.. 30	Heavy express and baggage between Pittsburg and Siloam Springs; soft track between De Quincy and Beaumont.
	20.	.. 30	Heavy express and baggage, and meet train, Beaumont.
	21.	7 45	Engine 404 not steaming properly, and meeting trains, Grandview to Pittsburg; driver broken off engine 173, mile 358; baggage and express at Shreveport; repairing wedge on engine 109 at Hornbeck.

Mail Trains Arriving at End of Route 30 Minutes or More Late.—Continued.

Date.	Delays.		Cause of delay.
	Hrs.	Min.	
Aug. 23.	..	30	Heavy baggage and express, and meet trains, Beaumont.
24.	..	35	Soft track between De Quincy and Beaumont; heavy baggage and express, and meet trains, Beaumont.
Sept. 8.	..	30	Derailment of train 1st 51 at Rust.
17.	6	20	Derailment, mile 290; sawing by freight trains at Hornbeck; heavy baggage at Leesville.
20.	1	30	Derailment of train #53, mile 68.
20			Train #3.
July 1,	4	5	Waiting for U. S. mail from post office at Shreveport; derailment of train extra, engine 377, mile 635.
2.	..	40	Gassing cars at Shreveport, unable to shut off gas.
3.	1	20	Train broke in two between Belt Junction and Grandview; heavy run of passengers, baggage, and express between Shreveport and De Quincy.
4.	7	20	Heavy travel between Mena and Shreveport; derailment train extra, engine 170, mile 757.
5.	2	10	Derailment train No. 51, mile 650.
6.	2	20	Derailment of train extra, engine 352, mile 514.
13.	1	5	Washout between Converse and Noble; meet #4 at Zwolle.
19.	1	50	Failure of air pump on engine 102; using hand brakes between De Ridder and De Quincy.
21.	1	30	Returned to Kansas City from Big Blue Junction for another engine a/c bursted flue; freight engine unable to make time between Kansas City and Pittsburg; repairing air pump on engine 102 at Shreveport.
22.	1	20	Meeting delayed train at Richards; engine 140 not steaming properly between Spiro and Thomasville; picking up extra coaches at Mena.
24.	5	20	Derailment of train #52 on mile 687.

*Mail Trains Arriving at End of Route 30 Minutes or
More Late.—Continued.*

Date.	Delays.		Cause of delay.
	Hrs.	Min.	
July 28.	2	..	Severe rainstorm and sawing by freight trains, Frierson; soft track between De Quincy and Beaumont; heavy baggage and express at Beaumont.
29.	1	30	Detouring via. Frisco between Gultton and Joplin, a/c derailment between those points.
30.	..	40	Repairing piston of engine 103 at Frierson.
Aug. 2.	1	45	Derailment of engine in Texarkana yard.
4.	1	45	Broken piston and cylinder head of engine 173, near Howard water tank; blocked in Mena yard by train #4.
11.	..	30	Repairing coach at Shreveport; repairing engine 103 at Orangeville.
22.	4	..	Delayed at Leesville a/c derailment of train extra, engine 354.
27.	..	35	Broken union on engine 102, on mile 729.
28.	1	10	Derailment of engine 110, mile 645.
31.	1	15	Picking up extra cars at Shreveport; hot box on engine at Mansfield; could not make running time a/c nine-car train; Beaumont to Port Arthur.
Sept. 1.	..	45	Making repairs to baggage car at Shreveport.
2.	1	20	Engine not steaming properly, Bloomburg to Rodessa; delayed for gas at Shreveport; could not make running time between Shreveport and De Quincy a/c eight-car train and light engine.
3.	2	15	Derailing of train No. 54, mile 119.
6.	1	5	Meeting delayed freight at Mooringsport; picking up extra car at Mansfield, and setting same out at Zwolle, heavy baggage and express at Leesville and Beaumont.
7.	..	30	Could not make running time between Wilton and Shreveport a/c broken atomizer on engine 401.
10.	..	35	Waiting for theatrical troupe and baggage car from Southern Pacific at Beaumont.
27.	2	10	Derailment of train extra, engine 335, near Rosepine.
30.	1	30	Derailment of engine 370 at Bloomburg.

Mail Trains Arriving at End of Route 30 Minutes or More Late.—Continued.

Date.	Delays.		Cause of delay.
	Hrs.	Mln.	
21			Train #4.
July 1.	2	35	Derailement of train extra, engine 377, mile 635.
2.	2	..	Derailement of train extra, engine 377, mile 635.
4.	1	5	Hot box on baggage car at Thomasville; express and baggage at Howe; broke train line pipe and picked up Fort Smith sleeper at Howe; heavy train north of Spiro.
6.	2	35	Derailement of train No. 51, mile 650; express and baggage, and picking up Fort Smith sleeper, Spiro.
23.	3	5	Derailement of engine 142 on mile 556; express and baggage at Spiro.
25.	7	15	Derailement of train #52, mile 687.
28.	..	40	Express and baggage, and picking up car at Spiro; meet trains, Westville.
30.	..	55	Engine 103 broke piston at Florian; pick up car at Spiro; express at Sallisaw; repairs engine 408; heavy train north of Spiro.
Aug. 5.	1	15	Taking fuel oil at Mena; picking up car at Spiro; engine not steaming properly between Bunch and Stilwell; picking up cars at Westville.
12.	..	50	Working on engine at Mena; hot driving box at Thomasville; picking up car at Spiro; soft track between Sallisaw and Stilwell.
16.	...	40	Repairing brake beam on engine 405; express and baggage at Spiro; mile 262; engine on freight train ahead running for water.
28.	3	40	Derailement of train extra; engine 323, near Lemon, Texas, express and baggage at Spiro.
29.	..	45	Meeting trains; express and baggage; picking up extra cars.
Sept. 1.	1	5	Taking fuel oil and working on engine at Mena; brick coming down in fire box; slow orders between Stilwell and Mena.

*Mail Trains Arriving at End of Route 30 Minutes or
More Late.—Continued.*

Date.	Delays.		Cause of delay.
	Hrs.	Min.	
Sept. 11.	..	30	Hot box on engine at Howe; saw by freight trains at Shady Point; working on headlight at Redland; headlight out Redland to Stilwell.
16.	9	35	Derailement on mile 290.
18.	2	17	Oil leaking out of tank at Marble City; engine sent from Stillwell to handle train; meeting train at Lyons; heavy train.
24.	1	30	Express and baggage, Howe and Heavenner; Spiro, derailement of train #7; meet train at Redland.
28.	5	15	Derailement of, train extra, engine 335, Rosepine.

—, W. Coughlin, principal transportation officer of the Kansas City Southern Railway Company, hereby certify that the foregoing statement is true to the best of my knowledge and belief.

Name: W. COUGHLIN,

Title: *General Manager.*

Subscribed and sworn to before me this 19th day of November, 1906.

[SEAL.]

CLARENCE R. HALL.

22 Thereon the Postmaster General issued an order as follows and notified the company thereof:

I hereby certify and approve the following orders and regulations, originating claims and affecting the accounts of the Post Office Department and Postal Service, in the following divisions and bureaus:

* * * * *

Second Assistant Postmaster General: Entire bureau. January 5, 1907.

* * * * *

GEO. B. CORTELYOU,
Postmaster General.

* * * * *

Ordered, that fines be imposed on contractors and deductions be made from their pay in the following cases, for Saturday, the 5th day of January, 1907. The right is reserved to make disallowances

from future payments for other failures or delinquencies, if any have occurred, and to correct errors and omissions.

* * * * *

Number of order, C 1332; number of route, 153,011; termini of route, Siloam Springs; State, I. T.; contractor's name, K. C. S. Ry. Co.; annual compensation, \$78,454.49. Case A. Port Arthur.

			Amount.	
Half trip.			Fine.	Deductions.
		Place, nature, and date of delinquency.		
		For late arrivals: Port Arthur, tr.		
		1, July 4, 5, 14, 19, 22, 24,		
		Aug. 4, 5, 9, 10, 16, 18, 20, 21,		
		23, 24, Sept. 8, 17, 20, (19 de-		
		lays); tr. 3, July 1, 2, 3, 4, 5,		
59	04	Tr. 1		
60	18	Tr. 3		
51	22	Tr. 4		
		6, 13, 19, 21, 22, 24, 28, 29,		
		30, Aug. 2, 4, 11, 22, 27, 28,		
		31, Sept. 1, 2, 3, 6, 7, 10, 27,		
		30 (29 delays); Siloam Springs,		
		tr. 4, July 1, 2, 4, 6, 23, 25, 28,		
		30, Aug. 5, 12, 16, 28, 29, Sept.		
		1, 11, 16, 18, 24, 28, 1906		
		(19)—20%.		
			..	\$768.03

23 Claimant from time to time rendered to the Postmaster General like statements of failures and detentions on the various other mail routes, as appear in the foregoing statement for the times named in the petition, upon which the Postmaster General issued the other orders of like character and for like failures and detentions. The aggregate of such deductions was \$3,355.48.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed on authority of the case of Louisville & Nashville Railroad Company, 53 C. Cls. —.

V. *Opinion of the Court, by Booth, J., Entered in the Case of Louisville & Nashville R. R. Co. (53 C. Cls., —), Above Referred To.*

Filed Feb. 25, 1918.

Opinion.

Booth, Judge, delivered the opinion of the court:

The record in this case affords no opportunity for an issue of fact. The evidence is made up of official reports from the Post Office Department and clearly discloses the exact situation.

The claimant company on July 1, 1903 and 1904, entered into contracts with the defendants to transport the mails of the United States over its lines of railway. The service contracted for is carefully arranged by the department and stated officially as the establishment of mail routes, designated in each instance by number. The contracts covering the service consist not of a formally written paper but are concluded by pursuing two distinct steps, viz: The mailing by the department to the company of what is technically termed "a distance circular." This paper, forwarded prior to the readjustment period, calls for information as to the distance between stations, etc., on the railroad company's line. Aside from eliciting information upon which, under section 4002, Revised Statutes, the department fixes the compensation to be paid for the services, it contains the following clause:

"In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform the services upon the conditions prescribed by law and the regulations of the department."

24 If the mail route is established, the second and final movement of the department is the mailing to the railroad company of a written order of authorization, which, among other things, expressly states: "This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week." If thereafter the railroad company transports the mails, the contract is complete and the terms prescribed. Under section 4002, Revised Statutes, these readjustments occur every four years and the contract is coextensive with this period of time.

On the dates mentioned in the preceding contracts there was in full force and effect section 3962, Revised Statutes, as follows:

"The Postmaster General may make deductions from the pay of contractors for failure to perform service according to contract and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

On October 2, 1905, the department promulgated the following regulation:

"On account of the inferior service resulting from failure to observe the schedule on routes, or parts of routes, on which railroad mail service is not more frequent than seven times a week each way, it is ordered that in certifying to the performance of the service on such routes for, and subsequent to, the quarter ended December 31, 1905, deductions be made at the rate of twenty (20) per cent of the value of each train that arrives at the termini or junction fifteen (15) or more minutes late, and the aggregate number of late arrivals is ten (10) or more, without satisfactory excuse, in any one quarter, except that no deduction of less than one dollar (\$1) will be made."

On June 26, 1906, the Congress passed the following statute:

"The Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to

time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions." 34 Stat. L., pp. 467, 472.

Subsequent to the passage of the foregoing enactment the Post Office Department promulgated a series of rules and regulations covering in minute detail the subject of deductions which would thereafter be made from railway transportation pay for failures upon the part of the company to observe its train schedule. As fully appears from *Finding V*, the claimant company suffered under the regulations for the various remissions shown, a total deduction in this respect of \$10,020.40. It is for the recovery of this amount that this suit is brought.

The case presents a dual aspect. It is first sedulously contended that the quadrennial contracts do not in terms nor by legal implication obligate the railroad company to transport the mails in accord with its train schedule, or, in other words, its time tables. Second, there being no Postal Laws or Regulations nor statutes of the United States in force at the time the contracts were made authorizing the Postmaster General to make deductions for the failure to observe train schedules, Congress could not, during the continuance of the contract period, as it attempted to do by the passage of the act of June 26, 1906, confer the claimed power and authority upon the head of the department; the contract could not be disturbed by legislation prior to its expiration. The settlement of one necessarily concludes the other. We deem it unnecessary to discuss both.

It has long since been settled that the distance circular, authorization order, statutes of the United States, Postal Laws and Regulations, as well as the practices of the Post Office Department, evidence the contract between the parties for the carriage of the mails, wherever the company performs the service. *Eastern Railroad Co. v. United States*, 129 U. S., 391; *Parker v. United States*, 26 C. Cl., 344.

25 In view of the adjudicated cases respecting the issue raised it is obvious that some power and authority was reserved by the terms of the contracts themselves to the Postmaster General to impose fines and make deductions. The reservation of the authority is not questioned in the claimant's brief; its extent only is challenged. It is true that except for the year 1879-1880 the Postmaster General has not made deductions from the railroads' compensation for transporting the mails for mere failure to maintain schedules; nor is it possible to identify an express regulation of the department covering the question prior to the one promulgated October 2, 1905, the department contenting itself with deductions for failures to complete a trip or a part thereof. Can it be said, however, that the mere failure to act, no matter if prolonged, destroyed the existing authority to act? If the authority vested in the Postmaster General under the law, which was concededly part of the contract of carriage, to make the deductions complained of, it is elementary that a mere failure to exercise the same did not abrogate it.

Section 3962, Revised Statutes, is general as to the extent of au-

thority reserved to the defendants respecting mail contracts and other delinquencies, while the amount of deductions for failure to complete a trip or trips is limited and circumscribed as to cause. There is nothing in the language of the statute which evidences a legislative intent to curtail the authority of the Postmaster General in other respects. Surely it can not be said, in view of the nature of the service to be performed, the absolute necessity for frequency and speed as set forth in section 4002, Revised Statutes, that Congress was expressly recognizing but one failure in the stipulated service as of sufficient importance to warrant the imposition of fines or the making of deductions. On the contrary, the act employs comprehensive terms—"may make deductions from the pay of contractors for failure to perform service according to contract and impose fines upon them for other delinquencies." This express reservation would be idle and meaningless if limited in scope and meaning to what follows in the act. The Congress by the statute was aware of the innumerable contingencies possible to arise in the transportation of the mails by rail which might embarrass and impede the administration of the Postal Service and wisely vested in the chief administrative officer of the department a discretion as to fines and deductions upon the happening of events other than those mentioned in the last paragraph of the act. As was said by this court in the Parker case, *supra*:

"The vast area of the post office system, its complexity of routes, the remoteness and distance of its operations from the seat of Government, require that a summary method of dealing with its innumerable contractors and sub-contractors shall exist, though its administration may involve instances of individual injustice."

A railway company offering its services to the Government for the transportation of its mails, under the terms and conditions of existing law, offers its complete facilities for the same. The worth as well as the volume of business given the various roads is predicated in a large measure upon its trip and station schedule, especially so as to competing lines. Time is most generally the very essence of railroad transportation, and it is difficult to perceive upon what hypothesis a company should be immune from observing this feature of the contract as to important intermediate stations on a railway postal route and suffer deductions for failure to traverse the entire route according to schedule. There may be instances when the exception claimed is fraught with infinitely more injury to the Postal Service than the failure for which penalties have uniformly been imposed.

It seems to us that the Post Office Department, in entering into contracts for the transportation of the mails, is not, under the necessary terms and conditions of the contract, to be precluded from asserting its right to have said mails transported according to the customary and published time cards of the company; that the per-

formance of the service in this respect is a very vital and important facility of a corporation engaged in the transportation of mails, otherwise the railway company may choose its own time. A rural community with but one mail each day is seriously

inconvenienced with an habitual delay in its delivery. The public adapt themselves to the station schedule of the railroad; and, again, quoting from the Parker case, "the failure to perform as he has agreed to causes a public inconvenience, the value of which can not be proved in dollars and cents or estimated by courts and juries."

The first paragraph of section 4002, Revised Statutes, provides in part as follows: "First. The mails shall be conveyed with due frequency and speed." What reference other than to publish-time tables can the terms "due frequency and speed" have? Where is the fact as to this mandatory provision of the law to be ascertained? From what source other than train schedules? Speed and frequency permeate the whole undertaking; it is part and parcel of the facilities which the railway company has to sell, and, indeed, to the most profitable mail routes, the chief inducement for the contract of transportation. The Postmaster General believed that under the contract he possessed authority to make the claimed deductions, for, on October 2, 1905, he initiated a plan for carrying it into effect. It is true the regulations limited the deductions to specified routes, but this alone did not affect the paramount right. There has never been any doubt as to the existence of the power or that under the contract, laws of the United States, and regulations of the department it was of sufficient breadth to cover every detail of the service, obviously embraced in the very act of carrying the mails by the railroads of the country.

The railroad company accepted the readjustment contract with all the general provisions as to fines and deductions in full force and effect. It knew they became part of the undertaking and thereby assumed the obligation of carrying the mails in the way and under the scheme usually and customarily adopted by railroads in the operation of their train service.

It has been often held that the failure to complete a trip or a part of the trip incurs deductions from the compensation earned for that particular trip, cases quite too familiar have sustained the power, and while the issue as to station schedules has not heretofore been before the courts, the reason for its absence is due to the fact that not heretofore has the Postmaster General exercised his authority. It was not until the subject became acute he deemed it necessary to act.

The act of June 26, 1906, *supra*, confirms this contention. This statute was not legislation conferring a power or authorizing an act. It was in effect a mandatory direction to the Postmaster General to do what he already had the right to do, a limitation of his discretion under section 3962 of the Revised Statutes. "The Postmaster General was authorized to do under section 3962 what he was obliged to do under the act of June 26, 1906." This, we think, is a sufficient answer to claimant's second contention. *Jacksonville, Pensacola & Mobile R. R. Co. v. United States*, 118 U. S., 626; *Chicago, Milwaukee & St. Paul R. R. Co. v. United States*, 127 U. S., 406; *Minneapolis & St. Louis Ry. Co. v. United States*, 24 C. Cls., 350.

The claimant company, as shown by the record, acquiesced in the deductions made, accepted the reduced compensation paid without

protest or objection, except in one particular instance, and the item complained of was adjusted by the department to its satisfaction. No complaint is made as to the reasonableness of the deductions involved or as to the conduct of the department in any respect, except as to its legality.

In our view of the case the petition must be, and the same is hereby, dismissed. It is so ordered.

Hay, Judge; Downey, Judge; Barney, Judge; and Campbell, Chief Justice, concur.

27

VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fourth day of March, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Kansas City Southern Railway Company, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that its petition be and it hereby is dismissed, on the authority of the case of the Louisville and Nashville Railroad Company, (53 C. Cls., R., —).

By THE COURT.

28

VII. *Proceedings Had After Entry of Judgment.*

On May 3, 1918 the claimant filed a motion to amend the findings of fact and for a new trial.

On June 5, 1918, on motion made in open court by Mr. Alexander Britton therefor, it was ordered that the claimant's motion to amend the findings of fact and for a new trial, filed May 3, 1918, be withdrawn.

VIII. *Claimant's Application for, and Allowance of, an Appeal.*

Comes now the Kansas City Southern Railway Company petitioner, in the above entitled cause, and by counsel prays the Court to grant an appeal to the Supreme Court of the United States from the decision and judgment of the Court of Claims in favor of the United States, dismissing said petition.

BRITTON & GRAY,
Attorneys for Petitioner.

Filed June 5, 1918.

Ordered that the above appeal be allowed as prayed for.

By THE COURT.

June 5, 1918.

29

In the Court of Claims.

No. 31973.

KANSAS CITY SOUTHERN RAILWAY COMPANY

VS.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law entered by the court; of the opinion of the court by Booth, J., entered in the case of Louisville & Nashville R. R. Co., (53 C. Cls., R. —); of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this Tenth day of June, A. D. 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,622. Court of Claims. Term No. 536. Kansas City Southern Railway Company, appellant, vs. the United States. Filed June 27th, 1918. File No. 26,622.